Supreme Court, U.S.
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02-1524

IN THE

Supreme Court of the United States

SHELLEY WEINSTOCK,

Petitioner,

—v.—

COLUMBIA UNIVERSITY,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Columbia University proffered a legitimate, nondiscriminatory reason for not granting petitioner tenure, and the Second Circuit determined upon a thorough review of the record that no reasonable fact-finder could find this reason was not the true reason, or intentional sex discrimination. If this determination was correct, the grant of summary judgment to Columbia was required by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Does the Second Circuit's fact-bound determination that petitioner failed to submit evidence from which a jury could have found pretext warrant this Court's review?

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JURISDICTION

The judgment of the Second Circuit *en banc* denying rehearing was entered on January 17, 2003. The petition for a writ of *certiorari* was filed on April 17, 2003. On April 30, 2003, the Court extended the time to respond to the petition until June 20, 2003. The jurisdiction of this Court was properly invoked under 28 U.S.C. § 1254(1) (2003).

COUNTER-STATEMENT OF THE CASE

1. Petitioner was employed by Barnard College, an affiliate of Columbia University, as an Assistant Professor in its Chemistry Department from July 1985 to June 1994. (App. 2.)[1] She was reviewed for tenure during the spring of 1993 and learned that Columbia had denied her tenure in May 1993. (App. 2, 6.)

As required by an affiliation agreement between Columbia and Barnard, petitioner could only have been granted tenure if, following earlier steps in the process, all the following occurred: (i) she received a favorable recommendation of a five-person *ad hoc* committee selected and convened by Columbia's Provost, Jonathan Cole; (ii) Provost Cole accepted that review; (iii) Columbia's President at the time, Michael Sovern, followed Provost Cole's advice to accept that review; and, finally, (iv) the Trustees of Barnard and Columbia granted tenure. (App. 2, 3.)

With Barnard's Dean, Robert McCaughey, and Provost Cole attending, the following *ad hoc* committee members met on April 12, 1993 to discuss petitioner's candidacy: (i) Professor Alan Tall, of Columbia's Department of Medicine, whom Cole also designated as the committee's Chair; (ii) Professor Samuel Silverstein, Chair of Columbia's Department of Physiology and Cellular Biophysics;

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[1] "App." refers to page numbers of the Appendix to the Petition. "Pet." refers to the Petition for Writ of *Certiorari* in this case.

(iii) Professor Zanvil Cohn of Rockefeller University; (iv) Professor Lila Braine of Barnard's Department of Psychology; and (v) Professor Paul Hertz of Barnard's Department of Biological Sciences. (App. 3-4.)

After Provost Cole reminded the *ad hoc* committee that the standards for tenure at Columbia were high because Columbia is an internationally renowned research university, Professor Sally Chapman, the Chair of Barnard's Chemistry Department, presented petitioner's case for tenure. (App. 4.) That the quality of research for both Columbia and Barnard professors must be uniform is undisputed by Barnard's President, Ellen Futter, and Columbia's former and current Presidents, Michael Sovern and George Rupp. (App. 20.)

Tall and Silverstein deemed petitioner's publications and research papers insufficient to merit tenure. (App. 4.) In their depositions, they testified that her research lacked originality and that the journals in which she published were not first-tier scientific journals. (*Id.*) Tall and Silverstein were also unimpressed with petitioner's letters of recommendation. (*Id.*) Silverstein noted that the letters were lukewarm by comparison to letters he had examined in other tenure reviews. (App. 4-5.)

The committee eventually voted 3-2 in favor of granting tenure. (App. 5.) Braine, Hertz, and Cohn voted for tenure; Tall and Silverstein voted against it. (*Id.*) A 3-2 favorable vote is considered "underwhelming [in terms of] support," according to Columbia's President, George Rupp. (*Id.*) From 1989 to the present, at least six candidates (five male, one female) were not granted tenure after a 3-2 *ad hoc* committee vote in favor of the grant. (*Id.*)

The decision to accept or reject the committee's vote moved to Provost Cole's desk. (*Id.*) Before Provost Cole made his decision, he contacted Ronald Breslow of Columbia's Chemistry Department for his insights. (*Id.*) Breslow stated bluntly that, measured by intellectual strength and scientific ability, petitioner was not in the

same league as other tenured members of Barnard's Chemistry Department. (*Id.*)

Provost Cole also discussed petitioner's candidacy with the Chair of Columbia's Chemistry Department, Richard Bersohn. (*Id.*) Cole learned from these inquiries, as well as from a previous inquiry of Bersohn by Columbia's Associate Provost, Stephen Rittenberg, that: (i) the general sentiment of the Columbia Chemistry Department was that petitioner's work was unimaginative and that her publication record was weak; (ii) the Columbia Department did not deem her worthy of tenure; but (iii) the Columbia Department had earlier voted to recommend her for tenure as a courtesy to their counterpart department at Barnard. (*Id.*)

Provost Cole eventually recommended against tenure because he felt that petitioner's scholarship was not up to Columbia's standards. (*Id.*) Columbia's President Sovern, who followed provostial recommendations on tenure as a matter of course, accepted Provost Cole's recommendation and denied tenure. (App. 6.)

Provost Cole's written explanation of his decision noted that: (i) a favorable 3-2 vote was not a strong endorsement; (ii) the two Columbia members of the committee, Tall and Silverstein, felt that petitioner's research was limited and below the quality expected of a candidate for tenure; (iii) candidates from Columbia and Barnard were to be judged for tenure by the same standards; (iv) Cohn, the outside member of the *ad hoc* committee, had stated that petitioner would not receive tenure at a research university such as Columbia even though he thought that her research was adequate for an institution such as Barnard; and (v) Provost Cole had collected evaluations from Breslow and Bersohn confirming his assessment that petitioner did not merit tenure. (App. 6-7.)

2. In February 1995, petitioner filed a complaint in the United States District Court for the Southern District of New York alleging that Columbia's denial of tenure

violated, *inter alia*, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (2003). Columbia moved for summary judgment upon completion of discovery. On July 28, 1999, the district court granted the motion, concluding that petitioner had failed to establish a triable issue of fact as to the pretextual nature of Columbia's legitimate, nondiscriminatory reason for denying her tenure. (App. 53-77.)

On August 23, 2000 the Second Circuit affirmed the district court's grant of summary judgment on essentially the same grounds. (App. 1-52.) The Second Circuit concluded that petitioner failed to produce evidence sufficient to support a rational finding that the legitimate, nondiscriminatory reason proffered by Columbia for not granting tenure – that she did not meet the standard for scholarship uniformly applicable within the University – was false. The Court also held that there was insufficient evidence to permit a finding that "more likely than not [discrimination] was the real reason." (App. 13, 29, relying on *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S 133, 148 (2000).) Before reaching this conclusion, the Second Circuit's thirty-page majority opinion analyzed in great detail all the factual issues petitioner seeks to have this Court examine, including the allegations of gender stereotyping, procedural irregularities, and disparate treatment. On every issue, responding at length to a dissent, the Second Circuit found a lack of any admissible evidence that would call into question Columbia's proffered nondiscriminatory reason for denying petitioner tenure, or support a reasonable finding of intentional sex discrimination.

On January 17, 2003, without dissent, the Second Circuit denied the petition for rehearing and rehearing *en banc*. (App. 78.)

REASONS FOR DENYING THE WRIT

The Second Circuit's decision rested squarely upon a thorough analysis of the admissible record evidence in accordance with basic and long-established standards under Federal Rule of Civil Procedure 56. Even if petitioner was correct about conflicts existing between the circuits – and she is not – this case does not present them. Nor does this case present any occasion for further elucidation of the legal principles explored or clarified in *Reeves*.

Columbia proffered what petitioner concedes would, if believed, be a legitimate, nondiscriminatory reason for not granting her tenure: that she did not meet the standard for scholarship uniformly applicable within the University. (Pet. 8; App. 13.) The Second Circuit held correctly that petitioner failed to produce sufficient admissible evidence from which a reasonable fact-finder could conclude this reason was not the true reason, or that intentional sex discrimination had played any role. (App. 13, 29.) As a result, the dismissal of her claim was mandated as a matter of law. *E.g., McDonnell Douglas*, 411 U.S. at 807.

The Second Circuit's detailed analysis revealed petitioner's factual assertions to be so weak that the Second Circuit recognized no need "to tarry on the question of how much evidence is necessary to find pretext." (App. 13 n.2.) *Reeves* made plain that "[w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors" in the factual record, including "the probative value of the proof [if any] that the employer's explanation is false." 530 U.S. at 148-49. Here, the two courts below carefully applied those factors, and the fact-bound conclusion that this case falls in the "judgment for defendant as a matter of law" category rather than the "disputed issues for trial" category presents no occasion for this Court's review.

Reeves differed from this case in that the plaintiff there proffered sufficient evidence to meet his pretext burden.[2] *Reeves* thus presented this Court an opportunity to resolve a conflict among the circuits as to whether meeting the pretext burden was alone "adequate to sustain a finding of liability for intentional discrimination," 530 U.S. at 140. That issue is not presented here, where both lower courts held that plaintiffs did *not* submit evidence sufficient, under Rule 56, to permit a reasonable finding that the proffered reason was not the true reason. (App. 29, 77.)[3]

Moreover, even if petitioner's proffer of evidence was construed over-generously as meeting her pretext burden, this would still be, as the Second Circuit held (App. 13, 29), one of the "instances" *Reeves* recognized in which summary judgment was appropriate because petitioner "created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." 530 U.S. at 148.

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[2] *Reeves* recognized that there are "appropriate circumstances" under which it could reasonably be inferred "from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." 530 U.S. at 147. On the other hand, *Reeves* emphasized that "[c]ertainly there will be instances where . . . no rational factfinder could conclude that the action was discriminatory," such as "if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.* at 148.

[3] The decision below was fully consistent with this Court's most recent Title VII decision, *Desert Palace, Inc. v. Costa*, __ U.S.__, No. 02-679, 2003 U.S. LEXIS 4422 (June 9, 2003), since petitioner presented insufficient evidence from which pretext could reasonably be inferred and no evidence of discrimination.

Because the conflicts alleged by petitioner either do not exist or are not presented by the decision below, or both, this case presents no legal issues warranting this Court's review. Any review would instead necessarily focus upon reconsideration of the Second Circuit's detailed determinations concerning whether the totality of evidence presented on various issues would permit findings of pretext (that is, warrant disbelief in Columbia's proffered reason) or of sex discrimination – the kind of review that even petitioner acknowledges does not warrant this Court's attention. (Pet. 10.)[4]

Petitioner only highlights the fact-bound nature of the Second Circuit's determinations by seeking to discredit these determinations through assertions of fact that lacked admissible evidentiary support even when assessed in the light most favorable to petitioner under Federal Rule of Civil Procedure 56:

- petitioner's assertion that anyone on the *ad hoc* committee referred to petitioner as "nurturing" lacked admissible substantiation (*compare* App. 16 *with* Pet. 4, 7, 20);
- "statistical evidence" of other tenure decisions was not part of the record because it was only "culled from an amicus brief and never presented to the district court or on appeal" (*compare* App. 21-22 *with* Pet. 7, 9, 23);

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[4] Petitioner suggests incorrectly that the Second Circuit drew distinctions between direct and circumstantial evidence when analyzing whether petitioner presented sufficient evidence of procedural irregularities, changes in qualification requirements, and biased comments to survive summary judgment. (Pet. 12, 16, and 20-22.) The Second Circuit made no such distinctions. Indeed, the Second Circuit did not even mention "direct" or "circumstantial" evidence in connection with the first two issues (App. 18-22) and, in connection with the third, merely noted that petitioner "failed to offer any direct evidence *or any testimony*" that a biased comment was made. (App. 16, *emphasis added.*)

- it was not "so rare" for Columbia to not grant tenure after a 3-2 *ad hoc* committee vote in favor of the grant because such a vote is considered "underwhelming in terms of support," and, from 1989 to 2000, at least six tenure candidates (five male, one female) were denied tenure after such a vote (*compare* App. 4, 6, 14 *with* Pet. 5);
- there was no basis in the record for petitioner's assertion that the tenure standards were subsequently lowered for a male Barnard professor (*compare* App. 28 *with* Pet. 6, 14, 15, 17); and
- as a corollary to the last two examples, there was no basis in the record for petitioner's assertion that Columbia "changed the rules" by "rais[ing] the bar" for tenure (*compare* App. 28 *with* Pet. 7, 8, 14).

In short, even if there were conflicts among the circuits regarding either what kinds of evidence permit a finding of pretext (that is, warrant a fact-finder's disbelief of the proffered legitimate reason) or what happens subsequent to a pretext finding – and there are not – this would not be the appropriate case in which to address those conflicts.

The question the petition proposes – "What is evidence of pretext?" – has a simple, long-established answer on which there is no circuit split whatever: evidence of pretext is *any* admissible evidence that would permit a fact-finder to reasonably conclude that the proffered reason is not the true reason. *See, e.g., Reeves*, 530 U.S. at 143 (quoting *Texas Dep't of Community Affairs v. Burdine*, 45 U.S. 240, 253 (1981)). There is no reason to believe that a better answer can be supplied, and nothing in the Second Circuit's decision suggests that it disagrees with any other circuit on this point.

The Court's central insight in *Reeves* – that a *prima facie* case plus pretext may, but will not always, be sufficient to allow a discrimination plaintiff to reach a jury, thus making judgment on the record, rather than by simplistic

formulas, inescapable – applies here as well. Far from conflicting on that point, all the circuits agree that the factors on which petitioner focuses (characterizations, departures from procedure, background statistics) may, but do not always, warrant disbelief in a proffered justification for a job action.

Because the Second Circuit and other circuits agree on the need for contextual judgment rather than rigid categorical rules in assessing whether a plaintiff has submitted evidence of "pretext," petitioner's "what is evidence of pretext" question raises no issue meriting review.

The additional question petitioner smuggled into Point V of her petition (but omitted from her Question Presented) is not worthy of review either. There is no circuit conflict over how to read and apply the central holding of *Reeves* that evidence of pretext, together with the *prima facie* case, will be sufficient in some cases and insufficient in others to permit an ultimate finding of discrimination. No circuit has deviated from *Reeves'* insistence on a case-by-case fact-intensive approach and instead mandated *per se* rules for the categorical treatment of varying types of evidence. The *per se* rules petitioner seeks to impose on the post-*Reeves* caselaw to gin up a conflict simply do not exist.

I. THIS CASE PRESENTS NO CIRCUIT CONFLICT ON WHETHER IRREGULARITIES IN EMPLOYER PROCEDURES ALWAYS AND NECESSARILY EVIDENCE PRETEXT.

A. The Second and the Other Circuits Agree that a Procedural Irregularity May, But Will Not Invariably, Warrant Reasonable Disbelief of an Employer's Proffered Explanation.

Petitioner's assertion that there is "a 5-3 circuit split on whether procedural irregularities *per se* may support an inference of discrimination" is false. (Pet. 12.) No circuit has a *per se* rule based on the simple fact that evidence exists of a procedural irregularity. Such a rule would be

absurd, because there are clearly numerous types of minor or easily explained procedural irregularities – especially those like the ones here that take place at a far remove from the actual decision-maker – that no reasonable fact-finder could possibly conclude evince pretext or intentional discrimination. Instead, all the circuits have consistently chosen a middle, *Reeves*-like path: a fact-intensive examination of whether the circumstances of the procedural irregularity in relationship to the alleged intentional discrimination warrant disbelief in the proffered explanation.

As petitioner acknowledges, the Second Circuit applied this standard here, explicitly recognizing that a procedural irregularity can raise an inference of discrimination where such a link exists. (App. 18; Pet. 12.) In this context, the Second Circuit explained in great detail why Cole's delay in releasing his written explanation of petitioner's tenure denial and Tall's expressions of concern about petitioner's research in his initial telephone calls to committee members did not reasonably give rise to a discriminatory inference that the Provost's decision to deny tenure was based on reason other than the one he gave. In light of the disconnect between the decisionmaker (and his decision) and the asserted procedural irregularities, the courts below simply and correctly concluded that the facts offered here did not permit any finding of pretext, that is, that Provost Cole's proffered reason for denying tenure was not the true reason.

This is the same standard as is applied by the five circuits wrongly said by petitioner to conflict with the Second Circuit on the issue. For example, in a case subsequent to the one that petitioner cites, the Fifth Circuit expressly limited when discrimination may be inferred from a procedural departure to "appropriate circumstances" in which the departure is "conscious and unexplained" and plaintiff "establishes some nexus" between it and the alleged discriminatory animus. *Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379, 396-97 (5th Cir. 2002). *See also J.R.*

Ridgley Wyvill v. United Companies Life Ins. Co., 212 F.3d 296, 305 (5th Cir. 2000) (vacating plaintiffs' jury verdict because, *inter alia,* they "put forth no evidence that would create a nexus between [the employer's deviation from procedure through] file-building and the plaintiffs' ages"), *cert. denied,* 531 U.S. 1145 (2001). [5]

Similarly, the Second Circuit's approach does not conflict with the approaches of the other four circuits petitioner mischaracterizes as having a *per se* rule mandating an inference of pretext, including:

- 10th Cir. – *see, e.g., English v. Colo. Dep't of Corr.*, 248 F.3d 1002, 1010 (2001) (pretext could not reasonably be inferred because plaintiff did not "show some nexus" between his termination and the decision-maker's investigation of reported racial epithets);
- 11th Cir. – *see, e.g., Bass v. Bd. of County Comm'rs*, 256 F.3d 1095, 1108 (2001) (employer's violation of its normal hiring procedure "may be," but is not automatically, evidence of pretext where "other facts surrounding the interview process . . . indicate that the process was suspect" and the employer "disregard[ed] all but one of the factors and qualifications generally taken into consideration");
- 9th Cir. – *see, e.g., Pottenger v. Potlatch Corp.*, No. 02-35235, 2003 U.S. App. LEXIS 9562, at *12 (May 19, 2003) (pretext could not reasonably be inferred from alleged procedural deviations in how quickly plaintiff's

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[5] Even the Fifth Circuit case petitioner cites comes nowhere near establishing a *per se* rule, but instead relies upon a clear nexus between the procedural deviation and the adverse employment action. *See Blow v. City of San Antonio*, 236 F.3d 293, 297 (5th Cir. 2001). Unlike here, San Antonio's sole purported non-discriminatory reason for failing to promote plaintiff – the lateness of her application – could not have existed but for defendant's deviation from written hiring procedures. *Id.*

termination was decided upon and the manner in which he was discharged); and

- D.C. Cir. – *see, e.g., Jones v. Washington Metro. Area Transit Auth.*, 205 F.3d 428, 434 (2000) (pre-*Reeves* holding that "it was not clearly erroneous" to find pretext based on three factors, one of which was a procedural irregularity with a direct nexus to the termination).

The two circuits that petitioner cites as being aligned with the Second Circuit also reject a *per se* rule in favor of an "all the facts and circumstances" *Reeves*–type approach – a nexus approach – when analyzing assertions of procedural irregularities. *See Dugan v. Albermarle County Sch. Bd.*, 293 F.3d 716, 722 (4th Cir. 2002) ("The issue is whether [the supervisor's] failure to apply the RIF policy was due to legitimate pedagogical concerns or his discriminatory animus toward [plaintiff]."); *Stewart v. Henderson*, 207 F.3d 374, 378 (7th Cir. 2000) (pretext could not reasonably be inferred from committee's failure to follow all aspects of procedure for reviewing written applications because "all the evidence indicates that the review committee believed it was implementing [the procedure] in recommending the candidates").[6]

B. Neither the Second Nor Any Other Circuit Has a *Per se* Rule that a Change In Qualification Requirements Either Does or Does Not Raise an Inference of Unlawful Discrimination.

The Second Circuit's well-supported determination that petitioner had presented no admissible evidence that the qualification requirements for the tenured position she

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[6] *See also Geddis v. Univ. of Del.*, 40 Fed. Appx. 650, 652-53 (3d Cir. 2002) (affirming summary judgment dismissing race and gender discrimination claims and finding no pretext despite plaintiff's evidence that University did not follow its standard procedures).

sought had changed (App. 20-22, 28) makes this case an inappropriate vehicle for addressing the consequences of an employer's change in qualifications.

Moreover, contrary to petitioner's assertion (Petition Point IB), the circuits are not in conflict on the issue. The mere mention of petitioner's argument in the stark terms of the above heading reveals its implausibility. Without examining the reasons for and other circumstances surrounding an employer's change in qualification requirements, no court could determine whether the change raises a discriminatory inference. For example, discrimination could not reasonably be inferred from a change in qualification requirements that was mandated by a change in the law, regardless of whether the change resulted in disparate treatment between a man and woman.

Not surprisingly, the suggestion that the Second and Fifth Circuits on the one hand, and five different circuits on the other, apply different "rules" on this point is entirely baseless:

- The decision below did not announce or apply any *per se* rule applicable to a showing of changed qualification requirements; and even if the Second Circuit had announced such a rule it would have been dicta, given its unequivocal holding that there was no evidence that Columbia had changed its qualification requirements for tenure (App. 20-22); and
- *Forman v. Small*, 271 F.3d 285, 293 (D.C. Cir. 2001), held that the dropping from later promotion decisions of a requirement that a book be completed failed to support pretext, not because of any *per se* rule, but "because the later promotion decisions occurred under different decision makers using different procedures, having different priorities, and considering different performance evaluations," *cert. denied*, 536 U.S. 958 (2002).

Similarly, none of the five decisions that petitioner asserts are on her side of the illusory "rule" schism reflect a *per se* rule. *See Goosby v. Johnson & Johnson Med., Inc.*, 228 F.3d 313, 320 (3d Cir. 2000); *Montemayor v. City of San Antonio*, 276 F.3d 687, 691 (5th Cir. 2001); *Curry v. Menard, Inc.*, 270 F.3d 473, 479-80 (7th Cir. 2001); *Dodoo v. Seagate Tech., Inc.*, 235 F.3d 522, 530 (10th Cir. 2000); *Sledge v. Goodyear Dunlop Tires N. Am., Ltd.*, 275 F.3d 1014, 1020 (11th Cir. 2001). All of them instead hinge upon fact-bound analyses of the degrees to which the plaintiffs' proffered evidence might reasonably be construed as evincing discrimination or at least the falsity of the employers' justifications for their actions. *Id.* Indeed, none of these decisions even involves the type of factual scenario – a change in qualification requirements – that petitioner mistakenly argues supports her case. *Id.*

II. THE SECOND AND THE OTHER CIRCUITS DO NOT APPLY GREATER DEFERENCE TO THE TENURE DECISIONS OF ACADEMIC INSTITUTIONS.

The Second Circuit did not say that it was according special deference to tenure decisions, and did not do so. Its statement that "[w]hen a college or university denies tenure for a valid, non-discriminatory reason, and there is no evidence of discriminatory intent, this Court will not second-guess that decision" (App. 13) evinces no such policy. This statement would be equally true if "a college" was replaced by "any employer" and "tenure" was replaced by "any job benefit."

Thus, the decision below does not conflict with the decisions petitioner cites from other circuits that also do not accord special deference to the tenure decisions of academic institutions.

III. THIS CASE PRESENTS NO CIRCUIT CONFLICT ON THE WEIGHT THAT MIGHT BE GIVEN TO BIASED REMARKS, AS NO REASONABLE FACT-FINDER COULD HAVE FOUND ANY HAD BEEN MADE.

The Second Circuit held correctly that petitioner presented no evidence of "biased comments" that could support a jury's finding that Columbia's reason for not granting petitioner tenure was pretextual or that the decision was the product of intentional sex discrimination, for three reasons.

First, petitioner presented insufficient evidence to permit a finding that statements characterizing petitioner (or other women) as "nurturing" had been made. (*Compare* App. 16 *with* Pet. 4, 7, 20-21.) Thus, the issue of whether that statement may be evidence of pretext cannot be resolved in this case. Second, references to petitioner as "nice" did not evince sex discrimination, and could equally well be viewed as a positive factor in the evaluation of her teaching performance. (App. 17-18.) Third, there was "no evidence" that the comments petitioner relied upon "were ever used to describe [petitioner's] quotidian research, which was the proffered non-discriminatory reason for Columbia's decision to deny her tenure." (App. 18.) Accordingly, this case does not present the issue of when pretext or even discrimination may be inferred from remarks that could reasonably have been found to be biased.[7]

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[7] The comments by Breslow on which petitioner relies (Pet. 20-21), about petitioner being not aggressive, not tough, and a pushover, have an even clearer lack of connection to the tenure decision, because he was never a part of the *ad hoc* committee and he volunteered these comments after its deliberations. (*Compare* App. 5 *with* App. 40.) The record was undisputed that Provost Cole made the relevant tenure decision. (App. 6.) In the context of the overall message Breslow was conveying –

Nor is there any circuit conflict on this issue. The Second Circuit did not hold or even suggest in this case that biased remarks can never be considered as evidence from which pretext or discrimination may be inferred if they do not relate to the employer's stated reason for the adverse action (*compare* App. 15-18 *with* Pet. 21) and has never so held in any previous decision. Indeed, the Second Circuit has frequently held that biased comments, under appropriate circumstances, justified such inferences. *See, e.g., Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 468 (2d Cir.) (when numerous references to older pilots as "contaminated" and "Bad Apples" are "viewed against the background of Delta's all-consuming interest in the age and projected retirement rates of the Pan Am pilots, they inescapably lead to the conclusion that Delta's actions may indeed have been motivated by age-based animus"), *cert. denied,* 534 U.S. 993 (2001); *Owens v. New York City Hous. Auth.*, 934 F.2d 405, 410 (2d Cir. 1991) (references to plaintiff's age "raise a genuine issue of fact on the issue of pretextuality" because, even though they "were not numerous," they were made by supervisors "responsible for the vast majority of the disciplinary charges brought against her"). Not surprisingly, the cases petitioner offers for having so held in other circuits (Pet. 21-22) do not disagree with the Second Circuit or each other on this point. *See, e.g., Manning v. Chevron Chem. Co.*, __ F.3d __, No. 01-41222, 2003 U.S. App. LEXIS 11679, at *21 (5th Cir. June 13, 2003) (alleged discriminatory comments were not evidence of pretext because they were not "proximate in time to the employment action" or "related to the employment decision at issue").

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petitioner was not in the same league as other tenured members of the Barnard Chemistry Department, measured by intellectual strength and scientific ability – these comments also could not support a verdict that the Provost discriminated against petitioner on account of sex discrimination. (App. 5; Pet. 5.)

IV. THIS CASE PRESENTS NO CIRCUIT CONFLICT ON THE RELEVANCE OF "BACKGROUND STATISTICS," AS NONE WERE PART OF THE SUMMARY JUDGMENT.

The Second Circuit was not – and this Court is not – presented with the issue of whether an employer's workforce composition may ever be relevant background evidence. Nor did the Second Circuit hold, as petitioner suggests, that "any and all numbers" could never be relevant "insofar as they addressed discrimination against women other than Petitioner." (*Compare* Pet. 23 *with* App. 21-22.)

Instead, since the statistics petitioner points to were merely "culled from an *amicus* brief and never presented to the district court or on appeal" (App. 21), the Second Circuit properly held that the asserted "statistical evidence" was "simply not part of the record" (App. 21-22) and for that reason irrelevant. This case therefore presents no question concerning the admissibility or relevance of such evidence when properly presented under Rule 56 or at trial.

Nor does the alleged circuit split exist. The Second Circuit has not held in this or any other case that such statistics are automatically irrelevant (if offered). To the contrary, the Second Circuit has often recognized circumstances in which statistics about an employer's workforce composition is relevant background evidence. *See, e.g., Stratton v. Dep't for the Aging*, 132 F.3d 869, 877 (2d Cir. 1997); *Luciano v. Olsten Corp.*, 110 F.3d 210, 217-18 (2d Cir. 1997).

Similarly, the other two circuit decisions that petitioner cites as holding that such statistics are irrelevant *per se* say no such thing. Both decisions emphasize that statistical evidence may or may not be relevant to a pretext analysis depending on various factors, including whether variables other than the protected classification were accounted for in the statistics and whether the statistics analyzed the

treatment of comparable employees. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1283 (9th Cir. 2000) ("Because they fail to account for many factors pertinent to [plaintiff], we conclude that the statistics are not enough to take this case to trial."), *cert. denied*, 533 U.S. 950 (2001); *Bogren v. Minnesota*, 236 F.3d 399, 406 (8th Cir. 2000) (citing and quoting *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 777-78 (8th Cir. 1995) ("statistical evidence 'may support a finding of pretext'" under certain circumstances, including "when it analyzes the treatment of comparable employees"), *cert. denied*, 534 U.S. 816 (2001).

V. PETITIONER FAILED TO MEET HER PRETEXT BURDEN, SO WHAT MIGHT HAVE HAPPENED IF SHE DID IS IRRELEVANT.

In Point V, although not in the question presented, petitioner suggests that this case presents an appropriate opportunity for this Court to proceed past the point it stopped at in *Reeves* and provide further guidance on when circumstances, plus pretext, warrant summary judgment. It presents no such occasion, not least because the Second Circuit held correctly that petitioner failed to produce sufficient admissible evidence from which a reasonable fact-finder could conclude that Columbia's proffered reason for not granting her tenure was false. (App. 29.) Without pretext, any discussion of what might happen post-pretext can only be hypothetical.

Moreover, the conflict petitioner asserts is illusory. No circuit has deviated from *Reeves'* insistence that a fact-intensive approach, rather than a *per se* rule, must govern determinations about whether judgment as a matter of law is appropriate post-pretext. Instead, every circuit has paid careful heed to whether the facts of each case present what *Reeves* described as either: (i) the "appropriate circumstances" under which it could reasonably be inferred "from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose"; or (ii) the "instances

where . . . no rational factfinder could conclude that the action was discriminatory." *Reeves*, 530 U.S. at 147-48.

CONCLUSION

For all the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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